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Ahmad Nasri bin Abdul Wahab v Disciplinary Appeal Board of The Malaysian Institute of Accountants & Ors

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HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25-211–07 OF 2020
NOORIN BADARUDDIN J
2 NOVEMBER 2022

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Civil Procedure — Judicial review — Application for — Applicant applied for judicial review against decision made in disciplinary proceedings — Applicant found guilty of act amounting to 'unprofessional conduct' under Malaysian Institute of Accountants (Disciplinary) Rules 2002 — Applicant sought to quash decisions
D *of Disciplinary Committee and Disciplinary Appeal Board — Whether decisions ought to be quashed*

This judicial review application arose from the applicant's challenge against the decision made in disciplinary proceedings taken against him under the
E Malaysian Institute of Accountants (Disciplinary) Rules 2002 ('the Disciplinary Rules') made under the Accountants Act 1967 ('Act 94'). The applicant who was a member of the second respondent ie the Malaysian Institute of Accountants ('MIA'), was found guilty of an act amounting to 'unprofessional conduct' within the meaning provided under r 2 of the
F Disciplinary Rules. The applicant sought, inter alia, an order of certiorari to quash the decision of the first respondent ie the Disciplinary Appeal Board of the MIA ('DAB') ('DAB's decision') confirming the decision of the Disciplinary Committee ('DC') of the MIA ('DC's and DAB's decisions'), an order quashing the DC's decision and a declaration that the applicant was not
G guilty of the charges against him. The DAB was a committee formed by the third respondent ie the council of the MIA for purposes of, among other things to consider all appeals lodged by the members of the MIA who were aggrieved by the decision made by the DC. The MIA was tasked to investigate the applicant relating to the 1Malaysia Development Bhd ('1MDB') audited
H reports. To facilitate the Investigation Committee ('IC') of the MIA, the IC had requested the applicant to furnish the 1MDB's audit working papers to them ('the requested documents'). The applicant informed that the permanent audit file and current audit working papers relating to the 1MDB were in the possession and custody of the Malaysian Anti-Corruption Commission
I ('MACC') and that he had no objections if the IC wanted to inspect the required information at the MACC's office. The IC informed the applicant that the original documents were not necessary and that photocopies were sufficient. The applicant then produced some of the requested documents in redacted form, with redacted information pertaining to, among others details

of the 1MDB's accounts with several financial institutions ('FI') ('the requested information'). KPMG Malaysia ('KPMG') was then acting as statutory auditors for the 1MDB for the financial period ending 31 March 2010 and the applicant as a partner at KPMG was the engagement partner at KPMG for the 1MDB's audit. The MIA requested that the applicant furnish the names of the FI's and 1MDB's account numbers with the FI directly to the Bank Negara Malaysia ('BNM'). The applicant wrote to the BNM informing them of his desire to cooperate. However, the applicant then took the position that he needed the 1MDB's consent prior to disclosing the requested information to the BNM. The 1MDB refused consent to release the requested information. The applicant informed to the BNM regarding the 1MDB's refusal and the BNM wrote to KPMG to indicate that the applicant was not prevented from furnishing the requested information under the Financial Services Act 2013 ('the FSA') and the Islamic Financial Services Act 2013 ('the IFSA'). The applicant refused to release the requested information. The applicant wrote to the 1MDB again for consent but was refused and consent was finally obtained on 29 June 2018. The applicant disclosed the un-redacted versions of the requested information and requested documents. A complaint was then lodged against the applicant by the Chief Executive Officer ('CEO') of the MIA ('complainant') on behalf of the MIA by a formal complaint ('the formal complaint'). The applicant was then charged with contravening r 8 of the Disciplinary Rules and ss 140.7(c)(ii) and 150.1 of the by-laws of the MIA ('by-laws') ('the charges'). The DC decided that the charges against the applicant was established, and that he had committed an act amounting to 'unprofessional conduct' and was thus guilty as charged. The DC imposed the following disciplinary penalties against the applicant: (a) a fine of RM5,000; and (b) the applicant was to pay RM98,671 in respect of the costs and expenses of and incidental to the disciplinary hearing before the DC and the investigation conducted by the IC. The applicant then appealed against the DC's decision to the DAB. The DAB consequently informed the applicant that it confirmed the DC's decision. Hence, this application for judicial review.

Held, dismissing the application with costs:

(1) Rule 3(3) of the Disciplinary Rules did not strictly spell out that any complaints by the MIA must be lodged through the third respondent. Section 9 of Act 94 did not prohibit the third respondent or the MIA from acting separately in terms of lodging complaints against the members of the latter. Section 20(1) of Act 94 related to the procedure of investigation and had no relation to the procedure of lodging a complaint. The applicant's contention that a breach of r 3(3) of the Disciplinary Rules tantamount to a breach of s 20(1) of Act 94 was therefore misconceived. Since the complainant had the role to take care of the day-to-day administration and a matter of public interest which was affecting the reputation of the MIA, the complainant as the CEO of

A the MIA had the capacity and was competent to lodge the complaint and the charge was valid pursuant to r 3(1) of the Disciplinary Rules. The procedures for lodging the complaint were not constrained by r 3(3) of the Disciplinary Rules. Rule 3(3) of the Disciplinary Rules was not a mandatory procedure and not the only procedure for the B complainant/MIA to lodge complaint to the registrar. There was no error in the findings of the DC and DAB that the formal complaint was valid (see paras 44, 50, 54–55 & 58).

(2) The applicant had breached r 7(b) of the Disciplinary Rules. There was C no error in the DC's and DAB's findings that the applicant had breached r 8 of the Disciplinary Rules due to his refusal to disclose the requested information to the IC or a body employed by it in conducting its investigation when so required by the said body. There was no indication that the DC or DAB had found the applicant guilty of any alternative D offence. The 'offence' was fully encompassed by the particulars of the complaint and the sections listed under the charge itself which dealt primarily with his failure to make a disclosure in co-operation with the IC's investigation. It was clear that the applicant had not been found guilty of a completely separate offence. The requirements for the charge E to be clear, specific and unambiguous had been met (see paras 68 & 70).

(3) The audit working papers and the information contained therein were the property of KPMG. The disclosure of any documents provided by the 1MDB to KPMG for the purposes of the statutory audit was governed by F the terms of engagement between the 1MDB and KPMG. The consent from the 1MDB for the disclosure of the requested documents/information was of no consequence. The applicant therefore could not justify his refusal to furnish the IC with the un-redacted form of the audit working papers. The applicant's contention that he could not G provide the un-redacted forms of the audit working papers to the IC as KPMG did not own the information contained therein, was therefore rightly rejected by the DC/DAB. There was no error of law and procedure in the findings of the DC/DAB on this issue (see paras 76–78).

(4) The BNM had acted on the powers conferred to it under s 133(2)(a) of H the FSA and s 145(2)(a) of the IFSA, as well as s 134(1)(b) of the FSA and s 146(1)(b) of the IFSA, which explicitly allowed it to provide written approval for the release of FI information to any person. The BNM could not be said to have acted ultra vires as it was exercising powers conferred to it by the FSA/IFSA. The BNM was clearly exercising its powers for the I objects and purposes provided for under the FSA/IFSA and the Central Bank of Malaysia Act 2009 as the regulator of FIs in Malaysia in considering the MIA's application. From the plain reading of the FSA/IFSA, the BNM was fully empowered to process applications for the disclosure of FI information by bodies such as the MIA. There was no

error of law when the DC and DAB relied upon the MIA's correspondence with the BNM in regard to the disclosure. The BNM was fully entitled to process the MIA's applications and the BNM had not acted ultra vires any statutes in considering such applications (see paras 80, 85 & 87).

(5) Section 140.7 of the by-laws stated that Appendix 1 was 'additional guidance on confidentiality'. As such, Appendix 1 was just an additional guidance to be referred to in the event a specific scenario was not explicitly provided for in s 140.7 of the by-laws itself. In addition, Appendix 1 itself stated that the outlined guidance in the appendix should be considered 'In addition to the requirements in s 140'. Therefore, s 140.7 of the by-laws merely outlined several requirements which must be complied with in the event of a request for such disclosure. The request by the MIA to the BNM fell squarely within the ambit of s 140.7(c)(ii) of the by-laws. Appendix 1 was irrelevant to the facts of the matter herein (see para 92).

(6) The BNM's letter was addressed to the applicant and he had produced a reply to the letter. The applicant knew all along the charges against him was based on the very same letter and he had responded extensively to the charge. The applicant was not estopped to challenge the BNM's letter at all levels. He was given the opportunity to address the issue at all stages of the DC and DAB proceedings and the applicant's sufficient knowledge of the charges and his conduct in proffering his defence clearly showed that he was not prejudiced nor deprived of the opportunity to contradict the charge against him. The applicant was also professionally represented at all material times and it was safe to presume that he had adequately put forward all the issues he raised in respect of the formal complaint (see paras 93–94).

(7) The IC need not apply to the High Court for an order to enforce assistance with the investigation because the BNM had confirmed that the requested information could be disclosed. The requirement under r 7(c) of the Disciplinary Rules was not mandatory, the exercise of which was at the discretion of the IC. The application to the BNM was clearly a route which was equally open to the IC under the law, and the IC's discretion in choosing the BNM route was under the relevant provisions of the Disciplinary Rules and by-laws (see paras 98–99).

(8) The DC's and DAB's decisions and their correct findings of guilt were proportionate to the objectives of the creation of the MIA under Act 94. Given the decisions of the DC and DAB were important for furthering the objectives under Act 94, it was clear that a finding of guilt to deter other members of the MIA from disobeying with their lawful obligations under the Disciplinary Rules and by-laws was entirely proportionate.

The finding of the applicant's guilty of 'unprofessional conduct' was fair, proportionate, reasonable and lawful (see para 102).

(9) The strict rules applicable to criminal trials or law to disciplinary proceedings was inapplicable herein. The cases cited by the applicant were criminal cases to which the court dismissed their applicability to the present matter. A disciplinary proceeding has a different set of rules and in regard to the present matter and under rr 17 and 29 of the Disciplinary Rules, the DC and DAB were permitted to regulate their own procedures as deemed necessary. No issue arose as to the competing interpretations of the FSA and the IFSA as there were in existence the express provisions of s 133(2)(a) of the FSA and s 145(2)(a) of the IFSA, s 134(1)(b) of the FSA as well as s 146(1)(b) of the IFSA (see paras 104–105).

(10) The complainant's motive for lodging the formal complaint was irrelevant as there was no requirement in r 3 of the Disciplinary Rules that the lodging of the complaint must be made bona fide. The formal complaint lodged by the CEO was not based on hearsay since the CEO had the personal knowledge of the non-compliance by the applicant in providing the requested documents to the IC for the purpose of investigation (see para 107).

(11) The ultimate effect of s 133(2)(a) of the FSA and s 145(2)(a) of the IFSA was that the applicant was not legally prohibited from disclosing the requested information. The IC's report had no impact on any substantive findings or decisions made by the DC and DAB, and the applicant failed to prove otherwise. There was clear authority for the BNM to process the MIA applications under the FSA and the IFSA, and the applicant's contention that the BNM was acting ultra vires was misconceived. Any purported flaws in the IC's report were all non-issues or matters which did not substantively impact the DC's and DAB's decision (see para 109).

(12) The applicant had failed to demonstrate how the alleged irrelevant matters had impacted the consideration of the DC or DAB or how the consideration of these issues had shown that both the DC and DAB had misunderstood or being ignorant of the relevant facts. In fact, none of the alleged irrelevant matters were shown to be the main consideration in the DC's and DAB's decisions. The applicant's contention that the DC and DAB had considered irrelevant matters was not grounds for the quashing of the decision (see paras 111–112).

(13) The court would not disturb the statutory right of the DC to award costs. Nowhere in the Rules was it stated the entitlement to a hearing on costs. Although the DC was not a party named herein, the costs imposed against the applicant was proper and reasonable and in accordance with r 18(3) of the Disciplinary Rules (see para 113).

[Bahasa Malaysia summary

Permohonan semakan kehakiman ini timbul daripada cabaran pemohon terhadap keputusan yang dibuat dalam prosiding tatatertib yang diambil terhadapnya di bawah Kaedah-Kaedah Institut Akauntan Malaysia (Tatatertib) 2002 ('Kaedah Tatatertib') yang dibuat di bawah Akta Akauntan 1967 ('Akta 94'). Pemohon yang merupakan ahli responden kedua iaitu Institut Akauntan Malaysia ('MIA'), didapati bersalah atas satu perbuatan yang berjumlah 'kelakuan tidak profesional' dalam pengertian yang diperuntukkan di bawah r 2 Kaedah Tatatertib. Pemohon memohon, antara lain, perintah certiorari untuk membatalkan keputusan responden pertama iaitu Lembaga Rayuan Tatatertib MIA ('DAB') ('keputusan DAB') yang mengesahkan keputusan Jawatankuasa Tatatertib MIA ('DC') ('keputusan DC dan DAB'), perintah yang membatalkan keputusan DC dan pengisytiharan bahawa pemohon tidak bersalah atas tuduhan terhadapnya. DAB adalah jawatankuasa yang dibentuk oleh responden ketiga iaitu majlis MIA bagi tujuan, antara lain untuk mempertimbangkan semua rayuan yang dikemukakan oleh ahli MIA yang terkilan dengan keputusan yang dibuat oleh DC. MIA ditugaskan untuk menyiasat pemohon berkaitan laporan audit 1Malaysia Development Bhd ('1MDB'). Untuk memudahkan Jawatankuasa Penyiasatan MIA ('IC'), IC telah meminta pemohon untuk memberikan kertas kerja audit 1MDB kepada mereka ('dokumen yang diminta'). Pemohon memaklumkan bahawa fail audit tetap dan kertas kerja audit semasa berkaitan 1MDB berada dalam simpanan dan jagaan Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') dan beliau tidak mempunyai bantahan sekiranya IC ingin memeriksa maklumat yang diperlukan di pejabat SPRM. IC memaklumkan kepada pemohon bahawa dokumen asal tidak diperlukan dan salinan fotostat adalah mencukupi. Pemohon kemudiannya mengemukakan beberapa dokumen yang diminta dalam bentuk yang disunting, dengan maklumat yang disunting berkaitan, antara lain butiran akaun 1MDB dengan beberapa institusi kewangan ('IK') ('maklumat yang diminta'). KPMG Malaysia ('KPMG') bertindak sebagai juruaudit berkanun untuk 1MDB bagi tempoh kewangan berakhir 31 Mac 2010 dan pemohon sebagai rakan kongsi di KPMG ialah rakan tugasan di KPMG untuk audit 1MDB. MIA meminta supaya pemohon memberikan nama IK dan nombor akaun 1MDB dengan IK secara terus kepada Bank Negara Malaysia ('BNM'). Pemohon menulis surat kepada BNM memaklumkan hasratnya untuk bekerjasama. Walau bagaimanapun, pemohon kemudian mengambil pendirian bahawa dia memerlukan kebenaran 1MDB sebelum mendedahkan maklumat yang diminta kepada BNM. 1MDB menolak kebenaran untuk mengeluarkan maklumat yang diminta. Pemohon memaklumkan kepada BNM mengenai keengganan 1MDB dan BNM menulis kepada KPMG untuk menyatakan bahawa pemohon tidak dihalang daripada memberikan maklumat yang diminta di bawah Akta Perkhidmatan Kewangan 2013 ('APK') dan Akta Perkhidmatan Kewangan Islam 2013 ('APKI'). Pemohon enggan mengeluarkan maklumat yang diminta. Pemohon

menulis semula kepada 1MDB untuk mendapatkan persetujuan tetapi ditolak dan persetujuan akhirnya diperoleh pada 29 Jun 2018. Pemohon mendedahkan versi maklumat tidak disunting yang diminta dan dokumen yang diminta. Aduan kemudiannya dibuat terhadap pemohon oleh Ketua Pegawai Eksekutif ('KPE') MIA ('pengadu') bagi pihak MIA melalui aduan rasmi ('aduan rasmi'). Pemohon kemudiannya didakwa melanggar k 8 Kaedah Tatatertib dan ss 140.7(c)(ii) dan 150.1 undang-undang kecil MIA ('undang-undang kecil') ('pertuduhan'). DC memutuskan bahawa pertuduhan terhadap pemohon telah dibuktikan, dan bahawa dia telah melakukan perbuatan yang berjumlah 'kelakuan tidak profesional' dan dengan itu bersalah seperti pertuduhan. DC mengenakan hukuman tatatertib berikut terhadap pemohon: (a) denda RM5,000; dan (b) pemohon perlu membayar RM98,671 berkenaan dengan kos dan perbelanjaan dan bersampingan dengan perbicaraan tatatertib di hadapan DC dan penyiasatan yang dijalankan oleh IC. Pemohon kemudiannya merayu terhadap keputusan DC kepada DAB. DAB seterusnya memaklumkan pemohon bahawa ia mengesahkan keputusan DC. Oleh itu, permohonan semakan kehakiman ini.

Diputuskan, menolak permohonan dengan kos:

(1) Kaedah 3(3) Kaedah Tatatertib tidak menyatakan dengan tegas bahawa sebarang aduan oleh MIA mesti dikemukakan melalui responden ketiga. Seksyen 9 Akta 94 tidak melarang responden ketiga atau MIA daripada bertindak secara berasingan dari segi membuat aduan terhadap ahli-ahlinya. Seksyen 20(1) Akta 94 adalah berkaitan prosedur penyiasatan dan tiada kaitan dengan prosedur membuat aduan. Pendapat pemohon bahawa pelanggaran k 3(3) Kaedah Tatatertib sama dengan pelanggaran s 20(1) Akta 94 oleh itu telah disalah anggap. Memandangkan pengadu mempunyai peranan untuk menjaga pentadbiran harian dan perkara kepentingan awam yang menjejaskan reputasi MIA, pengadu sebagai KPE MIA mempunyai kapasiti dan layak untuk membuat aduan dan pertuduhan itu sah menurut k 3(1) Kaedah Tatatertib. Prosedur untuk membuat aduan tidak dikekang oleh k 3(3) Kaedah Tatatertib. Kaedah 3(3) Kaedah Tatatertib bukanlah prosedur mandatori dan bukan satu-satunya prosedur bagi pengadu/MIA untuk membuat aduan kepada pendaftar. Tiada kesilapan dalam penemuan DC dan DAB bahawa aduan rasmi adalah sah (lihat perenggan 44, 50, 54–55 & 58).

(2) Pemohon telah melanggar k 7(b) Kaedah Tatatertib. Tiada kesilapan dalam penemuan DC dan DAB bahawa pemohon telah melanggar k 8 Kaedah Tatatertib kerana keengganannya untuk mendedahkan maklumat yang diminta kepada IC atau badan yang diambil bekerja olehnya dalam menjalankan siasatannya apabila dikehendaki oleh badan tersebut. Tiada petunjuk bahawa DC atau DAB telah mendapati pemohon bersalah atas sebarang kesalahan alternatif. 'Kesalahan' itu

diliputi sepenuhnya oleh butiran aduan dan bahagian yang disenaraikan di bawah pertuduhan itu sendiri yang menangani terutamanya kegagalannya membuat pendedahan dengan kerjasama penyiasatan IC. Adalah jelas bahawa pemohon tidak didapati bersalah atas kesalahan yang berasingan sepenuhnya. Syarat untuk pertuduhan itu jelas, khusus dan nyata telah dipenuhi (lihat perenggan 68 & 70).

(3) Kertas kerja audit dan maklumat yang terkandung di dalamnya adalah hak milik KPMG. Pendedahan mana-mana dokumen yang disediakan oleh 1MDB kepada KPMG untuk tujuan audit berkanun dikawal oleh terma penglibatan antara 1MDB dan KPMG. Kebenaran daripada 1MDB untuk pendedahan dokumen/maklumat yang diminta adalah tiada kesan. Oleh itu, pemohon tidak dapat mewajarkan keengganannya untuk memberikan IC dengan kertas kerja audit yang tidak disunting. Pendapat pemohon bahawa dia tidak boleh memberikan kertas kerja audit yang tidak disunting kepada IC kerana KPMG tidak memiliki maklumat yang terkandung di dalamnya, oleh itu wajar ditolak oleh DC/DAB. Tiada kesilapan undang-undang dan prosedur dalam penemuan DC/DAB mengenai isu ini (lihat perenggan 76–78).

(4) BNM telah bertindak atas kuasa yang diberikan kepadanya di bawah s 133(2)(a) APK dan s 145(2)(a) APKI, serta s 134(1)(b) daripada APK dan s 146(1)(b) APKI, yang secara jelas membenarkannya memberikan kelulusan bertulis untuk pelepasan maklumat IK kepada mana-mana orang. BNM tidak boleh dikatakan bertindak ultra vires kerana ia menjalankan kuasa yang diberikan oleh APK/APKI. BNM jelas melaksanakan kuasanya untuk objektif dan tujuan yang diperuntukkan di bawah APK/APKI dan Akta Bank Negara Malaysia 2009 sebagai pengawal selia IK di Malaysia dalam mempertimbangkan permohonan MIA. Daripada bacaan biasa APK/APKI, BNM diberi kuasa sepenuhnya untuk memproses permohonan bagi pendedahan maklumat FI oleh badan seperti MIA. Tiada kesilapan undang-undang apabila DC dan DAB bergantung kepada surat-menyurat MIA dengan BNM berhubung dengan pendedahan tersebut. BNM berhak sepenuhnya untuk memproses permohonan MIA dan BNM tidak bertindak ultra vires mana-mana statut dalam mempertimbangkan permohonan tersebut (lihat perenggan 80, 85 & 87).

(5) Seksyen 140.7 undang-undang kecil menyatakan bahawa Lampiran 1 adalah 'panduan tambahan mengenai kerahsiaan'. Oleh itu, Lampiran 1 hanyalah panduan tambahan untuk dirujuk sekiranya senario tertentu tidak diperuntukkan secara jelas dalam s 140.7 undang-undang kecil itu sendiri. Selain itu, Lampiran 1 sendiri menyatakan bahawa panduan yang digariskan dalam lampiran perlu dipertimbangkan 'Sebagai tambahan kepada keperluan dalam s 140'. Oleh itu, s 140.7 undang-undang kecil hanya menggariskan beberapa keperluan yang

A mesti dipatuhi sekiranya terdapat permintaan untuk pendedahan tersebut. Permintaan oleh MIA kepada BNM adalah dalam lingkungan s 140.7(c)(ii) undang-undang kecil. Lampiran 1 adalah tidak relevan dengan fakta perkara di sini (lihat perenggan 92).

B (6) Surat BNM telah diberikan kepada pemohon dan beliau telah memberikan jawapan kepada surat tersebut. Pemohon tahu pertuduhan terhadapnya adalah berdasarkan surat yang sama dan beliau telah memberi maklum balas secara meluas terhadap pertuduhan itu. Pemohon tidak dihalang untuk mencabar surat BNM di semua peringkat. Beliau diberi peluang untuk menangani isu itu di semua peringkat prosiding DC dan DAB dan pengetahuan pemohon yang mencukupi tentang pertuduhan dan kelakuannya dalam mengemukakan pembelaannya jelas menunjukkan bahawa beliau tidak diprejudis atau kehilangan peluang untuk menyanggah pertuduhan terhadapnya. Pemohon juga diwakili secara profesional pada setiap masa material dan adalah selamat untuk menganggap bahawa beliau telah mengemukakan dengan secukupnya semua isu yang dibangkitkannya berkenaan dengan aduan rasmi (lihat perenggan 93–94).

E (7) IC tidak perlu memohon kepada Mahkamah Tinggi untuk mendapatkan perintah untuk menguatkuasakan bantuan siasatan kerana BNM telah mengesahkan bahawa maklumat yang diminta boleh didedahkan. Keperluan di bawah k 7(c) Kaedah Tatatertib adalah tidak mandatori, pelaksanaannya adalah mengikut budi bicara IC. Permohonan kepada BNM jelas merupakan satu laluan yang sama terbuka kepada IC di bawah undang-undang, dan budi bicara IC dalam memilih laluan BNM adalah di bawah peruntukan Kaedah Tatatertib dan undang-undang kecil yang berkaitan (lihat perenggan 98–99).

G (8) Keputusan DC dan DAB serta penemuan kesalahan yang betul adalah berkadar dengan objektif penubuhan MIA di bawah Akta 94. Memandangkan keputusan DC dan DAB adalah penting untuk meneruskan objektif di bawah Akta 94, adalah jelas bahawa penemuan bersalah untuk menghalang ahli MIA lain daripada ingkar dengan kewajipan sah mereka di bawah kaedah Tatatertib dan undang-undang kecil adalah berkadar sepenuhnya. Dapatan pemohon bersalah atas 'kelakuan tidak profesional' adalah adil, berkadar, munasabah dan sah (lihat perenggan 102).

I (9) Peraturan ketat yang terpakai untuk perbicaraan jenayah atau undang-undang untuk prosiding tatatertib tidak terpakai di sini. Kes-kes yang disebut oleh pemohon adalah kes jenayah yang mana mahkamah menolak kebolehgunaannya terhadap perkara ini. Prosiding tatatertib mempunyai set peraturan yang berbeza dan berkenaan dengan perkara ini dan di bawah k 17 dan 29 Kaedah Tatatertib, DC dan DAB dibenarkan untuk mengawal selia prosedur mereka sendiri sebagaimana

yang difikirkan perlu. Tiada isu timbul tentang tafsiran bersaing APK dan APKI kerana wujudnya peruntukan nyata s 133(2)(a) APK dan s 145(2)(a) APKI, s 134(1)(b) APK serta s 146(1)(b) APKI (lihat perenggan 104–105). A

(10) Motif pengadu untuk membuat aduan rasmi adalah tidak relevan kerana tiada keperluan dalam k 3 Kaedah Tatatertib bahawa pengemukaan aduan mesti dibuat secara bona fide. Aduan rasmi yang dibuat oleh KPE bukan berdasarkan dengar cakap kerana KPE mempunyai pengetahuan peribadi tentang ketidakpatuhan pemohon dalam memberikan dokumen yang diminta kepada IC untuk tujuan penyiasatan (lihat perenggan 107). B C

(11) Kesan muktamad s 133(2)(a) APK dan s 145(2)(a) APKI ialah pemohon tidak dilarang dari segi undang-undang daripada mendedahkan maklumat yang diminta. Laporan IC tidak mempunyai kesan ke atas sebarang penemuan atau keputusan substantif yang dibuat oleh DC dan DAB, dan pemohon gagal membuktikan sebaliknya. Terdapat kuasa yang jelas untuk BNM memproses permohonan MIA di bawah APK dan APKI, dan dakwaan pemohon bahawa BNM bertindak ultra vires telah disalah anggap. Sebarang kecacatan yang dikatakan dalam laporan IC adalah semua bukan isu atau perkara yang tidak memberi kesan secara substantif kepada keputusan DC dan DAB (lihat perenggan 109). D E

(12) Pemohon telah gagal untuk menunjukkan bagaimana perkara yang didakwa tidak berkaitan telah memberi kesan kepada pertimbangan DC atau DAB atau bagaimana pertimbangan isu-isu ini telah menunjukkan bahawa kedua-dua DC dan DAB telah salah faham atau tidak mengetahui fakta yang berkaitan. Malah, tiada satu pun perkara yang didakwa tidak relevan ditunjukkan sebagai pertimbangan utama dalam keputusan DC dan DAB. Pendapat pemohon bahawa DC dan DAB telah mempertimbangkan perkara yang tidak relevan bukanlah alasan untuk membatalkan keputusan tersebut (lihat perenggan 111–112). F G

(13) Mahkamah tidak akan mengganggu hak berkanun DC untuk menganugerahkan kos. Tiada mana-mana dalam Kaedah itu menyatakan kelayakan untuk mendengar kos. Walaupun DC bukan pihak yang dinamakan di sini, kos yang dikenakan terhadap pemohon adalah wajar dan munasabah serta mengikut k 18(3) Kaedah Tatatertib (lihat perenggan 113).] H

Cases referred to

Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor [2003] 6 MLJ 49, HC (distd) I

Bar Malaysia v Index Continent Sdn Bhd [2016] 1 MLJ 445, FC (refd)

Chase Manhattan Bank NA v Mercantile Co-operative Thrift & Loan Society Ltd [1992] 2 MLJ 168, SC (refd)

Foo San Kan & Ors v Institut Akauntan Malaysia & Anor [2001] MLJU 393, HC (distd)
Francis v First Secretary of State and another [2008] EWCA Civ 890, CA (refd)
Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)
Lembaga Jurutera Malaysia v Leong Pui Kun [2009] 2 MLJ 36, FC (refd)
Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd [2015] 2 MLJ 509, CA (refd)
Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd [1985] 2 MLJ 359, SC (refd)
Pendaftar Pertubuhan v Datuk Justin Jinggut [2013] 3 MLJ 16, FC (refd)
Wenlock (Baroness) v River Dee Co (1885) 10 App Cas 354, HL (refd)
Yong Toi Mee & Anor v Malpac Holdings Bhd & Ors [2018] MLJU 326; [2018] 5 CLJ 619, HC (refd)

Legislation referred to

Accountants Act 1967 ss 3, 6(c), (d), 8, 9, 10(c), 19(c), 20(1)
Banking and Financial Institutions Act 1989 (repealed by Financial Services Act 2013) ss 45, 46, 118
Central Bank of Malaysia Act 1958 (repealed by Central Bank of Malaysia Act 2009) s 3
Central Bank of Malaysia Act 2009
Financial Services and Markets Act 2000 [UK]
Financial Services Act 2013 ss 131, 132(2)(a), 133(1), (2)(a), 134(1), (1)(b), (4)
Islamic Financial Services Act 2013 ss 46(1)(b), 143, 145(1), (2), (2)(a), 146(1), (1)(b), (4)
Malaysian Institute of Accountants (Disciplinary) (No 2) Rules 2002 rr 2, 3, 3(1), (2), (3), 4, 7(a), (b), (c), 8, 17, 18(3)(d), 29

Ira Biswas (with Alexie Ng Ying Ching) (Chooi & Company + Cheang & Ariff) for the applicant.
Mohanadass Kanagasabai (with Syarihah Razman and Tan Joon Meng) (Mohanadass Partnership) for the respondents.

Noorin Badaruddin J:

[1] This judicial review application arises from the applicant's challenge against the decision made in disciplinary proceedings taken against him under the Malaysian Institute of Accountants (Disciplinary) (No 2) Rules 2002 ('Disciplinary Rules') made under the Accountants Act 1967 ('Act 94'). The applicant was found guilty of an act amounting to an 'unprofessional conduct' within the meaning provided under r 2 of the Disciplinary Rules.

[2] Rule 2 of the Disciplinary Rules describe 'unprofessional conduct' as follows:

2. For the purpose of these Rules —

'unprofessional conduct' means conduct which is discreditable to the accountancy profession and includes gross carelessness, neglect and incapacity in the performance of professional duties, impropriety in professional conduct and conduct unbecoming of an accountant;

[3] The applicant seeks, inter alia, an order of certiorari to quash the decision of the first respondent ('DAB') dated 12 June 2020 ('DAB's decision') confirming the decision of the Disciplinary Committee ('DC') of the second respondent ('MIA') dated 17 May 2019 ('DC's decision') (collectively referred to as the 'DC's and DAB's decisions'), an order quashing the DC's decision and a declaration that the applicant is not guilty of the charges against him.

BACKGROUND FACTS

[4] The applicant is a member of the MIA.

[5] The DAB is a committee formed by the third respondent, the council of the MIA under s 19(c) of Act 94 for purposes of, among other things to consider all appeals lodged by the members of the MIA who are aggrieved by the decision made by the DC of the MIA.

[6] The MIA is a body corporate established under s 3 of Act 94 for purposes of, among other things, to provide for the registration of accountants and matters connected therewith.

[7] The third respondent is the Council of the MIA established under s 8 of Act 94.

[8] The MIA was tasked to investigate the applicant relating to the 1 Malaysia Development Berhad ('1MDB') audited reports. To facilitate the investigation, the MIA had requested the applicant to furnish the 1MDB's audit working papers to it for the purpose of the investigation.

[9] On or about 27 March 2015 and 31 March 2015, two complaints were lodged against the applicant to the MIA alleging failure on the part of the applicant to perform his duties and obligations as an independent external auditor of 1MDB in 2010. The two complaints are not the subject matter of the present judicial review.

[10] To facilitate the Investigation Committee ('IC') of the MIA in relation to the two complaints, the IC had on 7 July 2015 sent letters to the applicant requesting that he furnish them with the 1MDB's audit working papers to the IC ('the requested documents').

[11] On 4 August 2015, the applicant informed that the permanent audit file and current audit working papers relating to the 1MDB were in the possession and custody of the Malaysian Anti-Corruption Commission ('MACC') and that he had no objections if the IC wanted to inspect the required information at the MACC's office.

[12] On 18 September 2015, the IC informed the applicant that the original documents are not necessary and that photocopies are sufficient.

[13] The applicant then produced some of the requested documents in redacted form, with redacted information pertaining to, among others details of 1MDB's accounts with several financial institutions ('requested information').

[14] KPMG Malaysia ('KPMG') was then acting as statutory auditors for 1MDB for the financial period ending 31 March 2010 and the applicant as a partner at the KPMG was the engagement partner at KPMG for 1MDB's audit. The applicant then went on to state that they did not wish to infringe s 133(1) of the Financial Services Act 2013 ('the FSA') and s 145(1) of the Islamic Financial Services Act 2013 ('the IFSA').

[15] MIA then wrote to the Central Bank of Malaysia or Bank Negara Malaysia ('BNM') seeking approval under the FSA and IFSA to allow disclosure of the requested documents and requested information. MIA met with BNM on 10 June 2016 to seek BNM's approval for disclosure of the requested documents and requested information. BNM had indicated during this meeting it would grant approval provided that the applicant furnished BNM with the name of the Financial Institution/s ('FI/s') and the customer's account numbers with the FI.

[16] On 10 October 2016, MIA informed the applicant of BNM's stance and requested that the applicant furnish the names of the FI's and 1MDB's account numbers with the FI directly to BNM so that BNM can grant the approval. The applicant wrote to BNM on 18 October 2016, informing them of his desire to cooperate and requested for a copy of the BNM's letter to MIA.

[17] On 24 October 2016 BNM then wrote directly to the applicant requesting that he furnishes the requested information directly to them.

[18] However, on 2 November 2016, the applicant took the position that he needs 1MDB's consent prior to disclosing the requested information to BNM. 1MDB refused consent to release the requested information. A

[19] The applicant wrote again to BNM on 22 November 2016, stating that 1MDB had refused permission for him to disclose the requested information. B

[20] On 24 October 2016 and 15 December 2016, BNM wrote to KPMG to indicate that the applicant is not prevented from furnishing the requested information under the FSA and IFSA. The applicant refused to release the requested information. C

[21] On 10 January 2017, the applicant wrote to 1MDB again for consent, which was refused on 23 January 2017. Again on 10 June 2018, the applicant sought consent from 1MBD. Consent was only obtained on 29 June 2018. D

[22] Finally, on 4 July 2018 and 29 August 2018, the applicant disclosed the un-redacted versions of the requested information and requested documents.

[23] A complaint was then lodged against the applicant by the Chief Executive Officer of the MIA ('complainant') on behalf of the MIA by a formal complaint dated 5 January 2017 ('formal complaint') alleging that the applicant had failed to comply with: E

(a) r 7(b) of the Disciplinary Rules; and F

(b) s 140.7(c)(ii) of the by-laws of the MIA,

when instructed by the IC of the MIA to furnish to the IC the requested information and other supporting documents needed for its investigations on two other complaints lodged against the applicant and has constituted a breach of s 150.1 of the by-laws dealing with professional behaviour. G

[24] Upon receipt of the formal complaint, the Registrar of the MIA issued a notice of complaint dated 23 January 2017 ('notice of complaint') to the applicant, by which the applicant was informed that an investigation has been commenced against the applicant and the IC will be required to investigate and determine if the matter is fit to be referred to the DC. H

[25] The applicant provided his explanation by letter dated 22 February 2017 wherein he denied that he failed to comply with r 7(b) of the Disciplinary Rules and s 140.7(c)(ii) of the by-laws and that he did not breach s 150.1 of the by-laws dealing with professional behaviour. The applicant requested the right to be heard, to be legally represented and to call for witnesses in the event the formal complaint was to be referred to the IC. An interview between the I

applicant and the IC was conducted on 15 January 2018.

[26] The applicant was then charged with contravening the following rules and by-laws:

(a) r 8 of the MIA's Disciplinary Rules which states:

> 8. Refusal by member is an offence
>
> Any member of the Institute who refuses to comply with paragraph 7(b) commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit and shall in any event be referred to the Disciplinary Committee by the Investigation Committee;

(b) s 140.7(c)(ii) of the MIA's by-laws ('by-laws') which states:

> 140.7 As a fundamental principle, confidentiality serves the public interest because it facilitates the free flow of information from the professional accountant's client or employing organization to the professional accountant. Nevertheless, the following are circumstances where professional accountants are or may be required to disclose confidential information or when such disclosure may be appropriate:
>
> ...
>
> (c) there is a professional duty or right to disclose, when not prohibited by law:
>
> (i) to comply with the quality review of the Institute;
>
> (ii) to respond to an inquiry or investigation by the Institute's Investigation Committee or Disciplinary Committee or any other regulatory body;
>
> (iii) to protect the professional interests of a professional accountant in legal proceedings; or
>
> (iv) to comply with technical and professional standards, including ethical requirements.

(c) s 150.1 of the by-laws which states:

> 150.1 Professional Behavior
>
> The principle of professional behavior imposes an obligation on all professional accountants to comply with relevant laws and regulations and avoid any conduct that the professional accountant knows or should know may discredit the profession. This includes conduct that a reasonable and informed third party, weighing all the specific facts and circumstances available to the professional accountant at that time, would be likely to conclude adversely affects the good reputation of the profession' ['Charge/s']

[27] The charges against the applicant were heard by the DC over six hearing dates before the delivery of the DC's decision on 17 May 2019. The applicant

was permitted to submit oral and written witness evidence and both parties put forth their respective written submissions before the DC delivered its decision.

THE DC's DECISION

[28] The DC decided that the charge against the applicant was established, and that he had committed an act amounting to 'unprofessional conduct' and was thus guilty as charged. The DC consequently imposed the following disciplinary penalties against the applicant:

(a) the imposition of a fine of RM5,000; and

(b) the applicant was to pay RM98,671 in respect of the costs and expenses of and incidental to the disciplinary hearing before the DC and the investigation conducted by the IC.

[29] The grounds of the DC's decision were as follows:

(a) the DC agreed with the ICs finding that the formal complaint was validly lodged by the complainant in her capacity as officer of the MIA, and therefore written instruction and nomination by the third respondent was not required;

(b) the disclosure of the requested information of 1MDB contained in the audit working papers was not prohibited by s 133(1) of the FSA and s 145(1) of the IFSA as clearly directed by BNM;

(c) prior consent of 1MDB was not required for KPMG to disclose the requested information to the IC as these were the property of KPMG;

(d) Appendix 1 of s 140.7 of the by-laws was irrelevant as there was no ambiguity in the directions given by BNM, and BNM's direction was clear enough for the applicant to act on to enable BNM to process the MIA's application;

(e) the eventual provision of the requested information by the applicant did not negate the fact that he had breached r 7(b) of the Disciplinary Rules, and was only a point of mitigation for him; and

(f) the DC was of the unanimous opinion that the applicant was expected to comply with the Accountants Act 1967, Disciplinary Rules and by-laws to exhibit the highest standards of professional conduct and the failure to do so would be unethical as it could affect the good reputation of the profession.

[30] The applicant then appealed against the DC's decision to the DAB by way of two notices of appeal dated 3 June 2019 and 17 July 2019 respectively.

[31] The applicant subsequently made a written representation on 22 August 2019 and the IC submitted its own representation on 22 October 2019. The applicant was permitted to reply to the ICs representation, and did so on 12 November 2019.

[32] The DAB consequently informed the applicant by way of a letter dated 12 June 2020, that it confirmed the DC's decision.

DAB'S DECISION

[33] In its decision, the DAB made the following findings:

(a) that the CEO of the MIA was competent to lodge the formal complaint and charge pursuant to r 3(1) of the Disciplinary Rules;

(b) the applicant had breached r 7(b) of the Disciplinary Rules for his failure to produce the audit working papers relevant to 1MDB as per the IC's request;

(c) the DC, at all material times, had the right and has not erred in relying on the application made by MIA to BNM and correspondence between MIA, BNM and the applicant;

(d) 1MDB's consent was not required for the disclosure of information and documents in the audit working papers in relation to 1MDB;

(e) there were no errors in the DC's decision warranting the DAB's intervention; and

(f) the costs imposed against the applicant are proper and in accordance with the law.

[34] The applicant was legally represented throughout the proceedings before the DC and DAB.

[35] The applicant consequently filed this application for judicial review to this court on 24 July 2020.

APPLICANT'S GROUNDS OF CHALLENGE

[36] The applicant raised 13 grounds of challenge before this court and briefly they are as follows:

(a) ground 1: the charge is incompetent and invalid for non-compliance with Act 94 and the Disciplinary Rules and the DAB erred in law in not so finding;

(b) ground 2: The DAB erred in not finding that the charge was specific in

that it alleged a breach of a specific rule (r 7(b)) of the Disciplinary Rules of alleged non-provision of information to the IC. The charge cannot, in law, be changed to require the applicant to answer to something else as occurred in this case when the DAB decision found that the applicant was guilty by not providing information to BNM;

(c) ground 3: the applicant had complied with the Disciplinary Rules and by-laws. Hence, he is not guilty of the charge as he was prohibited by law from providing the requested information to the IC under the FSA and IFSA. The DAB acted in error of law in not so finding;

(d) ground 4: BNM has no power in law to entertain, receive, consider, process or decide on the MIA application for disclosure of the said information. The DAB's reliance on the MIA application to BNM and the resultant correspondence between BNM and the applicant/KPMG was thus made outside of its jurisdiction and in error of law;

(e) ground 5: The DAB acted in error of law in failing to apply Appendix I of the by-laws;

(f) ground 6: The IC's investigation was in breach of natural justice as the applicant was not heard on BNM's 15 December 2016 letter to KPMG thereby tainting the entire disciplinary process;

(g) ground 7: The DAB erred in not finding that the IC ought to have but did not use r 7(c) of the Disciplinary Rules to make an application to court for disclosure of the requested information;

(h) ground 8: The DAB's finding of guilt was irrational, unjust and out of proportion when the applicant acted reasonably and was justified in the precautions he took to ensure compliance with the law;

(i) ground 9: An exculpatory interpretation of the laws relating to the disclosure of the requested information ought to have been but was not taken by DAB. The DAB had therefore acted in error of law through its misapplication of the legal principles in this regard;

(j) ground 10: The MIA's motive for lodging the formal complaint was not bona fide, and the DAB failed to consider the same. The DAB's decision is therefore tainted with illegality;

(k) ground 11: The DAB erred in law in not taking into account that the lC's report on which the disciplinary proceedings were based was in error of law, flawed and resulting in a breach of natural justice tainting the entire disciplinary process;

(l) ground 12: The DAB erred in law in failing to take into account that the MIA/IC considered irrelevant matters which tainted the entire disciplinary process; and

(m) ground 13: The DAB erred in law and was in breach of natural justice in not finding that the applicant was not given an opportunity to present his position to the DC on the costs awarded against him, and that the costs are unreasonable and excessive.

SUMMARY OF THE RESPONDENTS' CONTENTIONS

[37] In summary, the respondents submit that this judicial review application ought to be dismissed with costs for the following reasons:

(a) the DC's and DAB's decisions were made in accordance with the applicable laws and procedures. In particular, in finding the applicant guilty of the charges made against him, the DC's decision was made in compliance with Act 94 and the Disciplinary Rules which give rise to the powers of the DAB; and

(b) the applicant is seeking in substance a revisit of the factual findings and conclusions of the DAB which is not permitted under the law.

FINDINGS

[38] The central issue in this application is whether the DC's and DAB's decision is reviewable by way of judicial review. It is trite that in judicial review application, the court is more concerned with the decision-making process and not the decision itself. The court should not readily question the administrative decision as that is their absolute discretion. The power of the High Court to interfere in such a case is not as an appellate authority but as a judicial authority to see whether there is fundamental procedural flaw or contravention of the law by the administrative authority in arriving at its decision.

[39] In reviewing whether the prerogative writ in the form of certiorari relating to disciplinary proceedings ought to be issued, the Federal Court in *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 had succinctly stated the principles as follows:

> In the normal course, it is the disciplinary authority which is the best judge as to whether the person should be dismissed. In that context, *the court can only exercise its powers of interference in a limited number of cases where it is shown that the decision to suspend is arbitrary and/or a mala fide exercise of power and/or colourable exercise of power … It is not for the courts to interfere with exercise of discretion by the disciplinary authority otherwise than in the circumstances set out …*
>
> *… It must be stressed that the courts cannot introduce technicalities of a court of law to the disciplinary authority. Further, courts do not normally regard it as their function to interfere with the findings of fact by the disciplinary authority.* In *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456, Diplock LJ said (at p 488)*:*
>
> These technical rules of evidence, however, form no part of the rules of natural

justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.

[36] The courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. *The courts will only intervene in disciplinary cases where there was a fundamental procedural flaw. The courts cannot exceed its role in cases of this genre as the instant appeal. The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Weighing and assessing the evidence is the function of the disciplinary authority which is the body to which the legislature has entrusted the responsibility of deciding the issue and not the courts. Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has been an error in the process or whether there was procedural irregularity in the decision-making proceedings leading to the public officer's dismissal.* (Emphasis added.)

The first ground

[40] It is the applicant's contention that the charge framed against him by the IC is invalid as the formal complaint was lodged by the complainant and on behalf of the MIA. It is contended that the formal complaint is incompetent and invalid as there is no written instruction and nomination by the third respondent to the complainant to make the formal complaint as required under s 20(1) of Act 94 and r 3(3) of the Disciplinary Rules.

[41] Section 20(1) of Act 94 states:

20 Functions of Investigation Committee and Disciplinary Committee.

(1) The Investigation Committee shall investigate any complaints made against any member in the manner laid down in the rules and where it considers that this is justified shall refer the matter to the Disciplinary Committee.

[42] Rule 3(3) of the Disciplinary Rules reads:

3 Complaints

...

(3) *Where facts are brought to the knowledge of the Council which indicate that any member has done anything which renders an investigation necessary, the Council may*

instruct the Chairman of the Council or any other member nominated in writing by the Council for this purpose to make a formal complaint to the Registrar who shall refer such complaint to the Investigation Committee.

[43] The complainant is one Dr Nurmazilah who lodged the formal complaint in her capacity as the Chief Executive Officer of the MIA. It can be gleaned from the response to section 1.1 of the formal complaint, the complainant was acting in her capacity as the Chief Executive Officer of the MIA in lodging the formal complaint and not on behalf of any other party.

[44] Reading r 3(3) of the Disciplinary Rules, this court agrees with the findings made by the DC/DAB that r 3(3) of the Disciplinary Rules does not strictly spell out that any complaints by MIA must be lodged through the third respondent. It is of the considered view that r 3(3) of the Disciplinary Rules merely provides that in cases *where facts are brought to the knowledge of the Council*, the third respondent may file complaints against any members of the MIA by instructing its' Chairman or any other member nominated in writing for the purpose to make a formal complaint to the Registrar who shall refer such complaint to the IC. In other words r 3(3) of the Disciplinary Rules empowered the third respondent to nominate in writing a specific person to lodge a formal complaint for purposes of investigation of the IC. Bearing in mind that the word 'may' is used in r 3(3) of the Disciplinary Rules, the Rule is therefore directory and not mandatory indicating that it is not a prerequisite for the third respondent to make such a complaint.

[45] Rules 3(1) and (2) of the Disciplinary Rules provide that:

> 3(1) Every complaint against any member shall addressed in the first instance to the Registrar.
>
> (2) The Registrar shall then refer such complaint to the Investigation Committee once it satisfies the requirements of rule 4.

[46] Rule 4 of the Disciplinary Rules requires for every complaint other than made by a court shall be in writing.

[47] It is clear that r 3 of the Disciplinary Rules does not state or restrict that complaints against members of the MIA can only be lodged by the third respondent under r 3(3). The Disciplinary Rules provides that complaints can be made pursuant to r 3(1).

[48] As the CEO of the MIA which is a body responsible for ensuring compliance of its members with professional standards and statutes in discharging their duties to the clients and employees, r 3(1) of the Disciplinary Rules does not bar the complainant from lodging a formal complaint in such

capacity. The complainant does not state that she was directed or instructed by the third respondent in lodging the complaint and as such the requirement under r 3(3) of the Disciplinary Rules does not arise herein. This court agrees with the DAB's view that r 3 of the Disciplinary Rules is to be read disjunctively and that there is no requirement that a complaint can only be made through r 3(3) of the Disciplinary Rules.

[49] It is further contended by the applicant that if r 3(3) of the Disciplinary Rules is to be read disjunctively from sub-r (1), such an interpretation would allow the third respondent to act separately from the MIA or vice versa which contravenes s 9 of Act 94. This court finds the contention is misplaced. Section 9 of Act 94 states:

> 9. General powers of the Council. The Institute and its funds shall be managed by the Council and all such powers, acts or things as may be exercised or done by the Institute which are not by this Act expressly directed or required to be exercised or done by the Institute in general meeting may, subject to this Act or any rules or any resolution passed from time to time by the Institute in general meeting be exercised or done by the Council:
>
> Provided that no resolution of the Institute shall invalidate the exercise of any power or the doing of any act or thing by the Council previously which would have been valid if such resolution had not been passed.

[50] It is of the considered view that s 9 of Act 94 merely provides for the powers and the obligations of the third respondent which may be exercised in discharging its duty in managing the MIA. The section does not prohibit the third respondent or the MIA for that matter from acting separately in terms of lodging complaints against the members of the latter.

[51] In asserting that the MIA is to act under the direction and authorisation of the third respondent, the applicant further cited s 10(c) of Act 94 which provides specific powers of the third respondent. Section 10(c) of Act 94 reads:

> 10 Specific powers of the Council.
>
> Without prejudice to the generality of section 9 *and subject* to any rules, the Council shall have power —
>
> ...
>
> (c) to take cognisance of anything affecting the Institute or the professional conduct of its members and to bring before any general meeting of the Institute any matter which it considers material to the Institute or to the interests of the profession and make any recommendations and take such action as it deems fit In relation thereto.

[52] Section 10(c) of the Act 94 underlines the role of the third respondent; that it is to *take cognisance* of anything affecting the MIA or the professional

conduct of its members and to raise them before the MIA's general meeting if it considers material. It is clear that s 10(c) of the Act 94 does not state that MIA can only act solely through the direction and/or instruction of the third respondent. The establishment of the third respondent is to discuss, make recommendations and take actions as it deems fit in relation to matters affecting the MIA or to the interest of the profession. The powers of the third respondent is rather similar to the powers given to the Bar Council who manages the affairs of the Malaysian Bar. Nowhere under the law which states that the Malaysian Bar is to and can only act solely through the Bar Council. Neither can the applicant shows that the MIA can only act solely through the third respondent.

[53] The provisions in Act 94 reveal that the MIA and the third respondent are two different entities; the MIA being incorporated under s 3 of Act 94 and the third respondent under s 8 of Act 94. Each has its own role to perform. The filing of a complaint by an officer of the MIA ie the complainant and the filing of a complaint with knowledge of the third respondent cannot be equated as the MIA and the third respondent are separate entities. Knowledge obtained by an officer of the MIA is in no way the same as this knowledge coming into the awareness of the third respondent. Rule 3(3) of the Disciplinary Rules being a non-mandatory provision is an option made available to the third respondent and does not hinder the operation of r 3(1) of the Disciplinary Rules as a mandatory rule (by virtue of the word 'shall' therein) wherein the complainant can lodge the formal complaint.

[54] In addition, reading s 20(1) of Act 94, the IC can conduct investigation into any complaint made against any member of the MIA and not restricted to investigate the same solely under r 3(3) of the Disciplinary Rules. It is pertinent to note that s 20(1) relates to the procedure of investigation and has no relation to the procedure of lodging a complaint. The applicant's contention that a breach of r 3(3) of the Disciplinary Rules tantamount to a breach of s 20(1) of Act 94 is therefore misconceived.

[55] This court agrees with the finding of the DAB that since the complainant has the role to take care of the day-to-day administration and a matter of public interest which is affecting the reputation of the MIA, the complainant as the CEO of the MJA has the capacity and is competent to lodge the complaint and the charge is valid pursuant to r 3(1) of the Disciplinary Rules. The procedures for lodging the complaint is not constrained by r 3(3) of the Disciplinary Rules. Rule 3(3) of the Disciplinary Rules is not a mandatory procedure and not the only procedure for the complainant/MIA to lodge complaint to the Registrar.

[56] It cannot be gainsaid that there is a breach of natural justice as alleged by the applicant on the ground that the complaint was lodged by the CEO of the MIA. The complainant had lodged the formal complaint in her own individual capacity and not as representatives of any of the respondents. There is no requirement for the complainant to obtain authorisation from the third respondent under the optional procedure outlined in r 3(3) of the Disciplinary Rules. The IC is fully authorised to investigate the complaint. The DAB made a finding that r 3 of the Disciplinary Rules is to be read disjunctively to which this court agrees. There is no requirement that a complaint be made through r 3(3) of the Disciplinary Rules solely. The DAB had correctly decided that the formal complaint was lodged pursuant to r 3(1) of the Disciplinary Rules.

[57] There is no fundamental procedural flaw in the decision-making process of both the DC and the DAB. As much as the applicants had all the opportunities of being represented and be heard in both proceedings before the DC and the DAB, the DAB are fully permitted to rely on the advice of its Secretariat, and consider it alongside any representations by the parties to a disciplinary complaint and there is nothing to show before this court evidence of the DC's and the DAB's independence being compromised.

[58] There is no error in the findings of the DC and the DAB that the formal complaint is valid and there is no reason for this court to interfere with the DC and DAB's decisions on this ground.

Ground 2

[59] There is no doubt that the applicant is well aware of the complaint against him. It is his refusal to provide the required information. the applicant had addressed the complaint extensively in his written statements before the DC and written representations before the DAB.

[60] Rule 7(b) of the Disciplinary Rules states:

> 7 Powers of Investigation Committee
>
> For the purposes of an investigation, the Investigation Committee may—
>
> (a) call upon or employ any person to conduct any preliminary inquiry it deems necessary;
>
> (b) require the member against whom the complaint was made or any other member who can help with the investigation to produce for inspection any books, documents or papers which maybe reasonably required by the Investigation Committee or by the person so employed; and
>
> (c) apply to the High Court for an order to enforce paragraph (a) or (b).

[61] The IC can require the applicant to produce documents or a person so employed to help with the investigation. The applicant's alleged obstacles in refusing to provide the requested information stems from the provisions of s 140.7(c)(ii) of the by-laws by ss 133(1), 134(1) and 134(4) of the FSA and ss 145(1), 146(1) and 146(4) of the IFSA which in essence are the secrecy provisions. For ease of reference, these provisions are reproduced:

Section 140.7 of the by-laws:

As a fundamental principle, confidentiality serves the public interest because it facilitates the free flow of information from the professional accountant's client or employing organization to the professional accountant. Nevertheless, the following are circumstances where professional accountants are or may be required to disclose confidential information or when such disclosure may be appropriate:

(a) Disclosure is permitted by law and is authorized by the client or the employer;

(b) Disclosure is required by law, for example:

(i) Production of documents or other provision of evidence in the course of legal proceedings; or

(ii) Disclosure to the appropriate public authorities of infringements of the law that come to light; and

(c) There is a professional duty or right to disclose, when not prohibited by law:

(i) To comply with the quality review of the Institute;

(ii) To respond to an inquiry or investigation by the Institute's Investigation Committee or Disciplinary Committee or any other regulatory body;

(iii) To protect the professional interests of a professional accountant in legal proceedings; or

(iv) To comply with technical and professional standards, including ethical requirements

Please also refer to the additional guidance on confidentiality in Appendix 1 to the by-laws.

Section 133(1) of the FSA.

(1) No person who has access to any document or information relating to the affairs or account of any customer of a financial institution, including —

(a) the financial institution; or

(b) any person who is or has been a director, officer or agent of the financial institution, shall disclose to another person any document or information relating to the affairs or account of any customer of the financial institution.

Section 134(1) and (4) of the FSA:

134(1) A financial institution or any of its directors or officers may —

(a) for such purpose or in such circumstances as set out in the first column of Schedule 11, disclose any document or information relating to the affairs or account of its customer to such persons specified in the second column of that Schedule; or

(b) disclose any document or information relating to the affairs or account of its customer to any person where such disclosure is approved in writing by the Bank.

(2) The financial institution or its directors or officers making a disclosure for the purposes or in such circumstances set out in Schedule 11 and paragraph (1)(b), shall be subject to such conditions as may be specified by the Bank.

(3) For the purposes of subsection (2), the Bank may at any time amend or revoke any existing conditions or impose any new conditions in respect of permitted disclosures by the financial institutions set out in Schedule 11 or paragraph (1)(b).

(4) Any person who receives any document or information relating to the affairs or account of a customer as permitted under subsection (1) shall not disclose such document or information to any other person. :

Section 145(1) of the IFSA:

145(1) No person who has access to any document or information relating to the affairs or account of any customer of an Islamic financial institution, including—

(a) the Islamic financial institution; or

(b) any person who is or has been a director, officer or agent of the Islamic financial institution, shall disclose to another person any document or information relating to the affairs or account of any customer of the Islamic financial institution.

Section 146(1) and (4) of the IFSA:

146(1) An Islamic financial institution or any of its directors or officers may —

(a) for such purpose or in such circumstances as set out in the first column of Schedule 11, disclose any document or Information relating to the affairs or account of its customer to such persons specified in the second column of that Schedule; or

(b) disclose any document or information relating to the affairs or account of its customer to any person where such disclosure is approved in writing by the Bank.

(2) ...

(3) ...

(4) Any person who receives any document or information relating to the affairs or account of a customer as permitted under subsection (1) above shall not disclose such document or information to any other person.

[62] It is clear that these secrecy provisions are not absolute and are subject to

exceptions. Sections 133(2)(a) of the FSA and 145(2)(a) of the IFSA, which are similar read as follows:

> Section 133(2)(a) of the FSA:
>
> (2) Subsection (1) shall not apply to any document or information relating to the affairs or account of any customer of a financial institution —
>
> (a) that is disclosed to the Bank, any officer of the Bank or any person appointed under this Act or the Central Bank of Malaysia Act 2009 for the purposes of exercising any powers or functions of the Bank under this Act or the Central Bank of Malaysia Act 2009; :
>
> Section 145(2)(a) of the IFSA:
>
> (2) Subsection (1) shall not apply to any document or information relating to the affairs or account of any customer of an Islamic financial institution —
>
> (a) that is disclosed to the Bank, any officer of the Bank or any person appointed under this Act or the Central Bank of Malaysia Act 2009 for the purposes of exercising any powers or functions of the Bank under this Act or the Central Bank of Malaysia Act 2009;

[63] The exceptions in s 133(2)(a) of the FSA and s 145(2)(a) of the IFSA clearly show that s 133(1) of the FSA and s 145(1) of the IFSA are inapplicable in the context of a disclosure to be made to BNM which is in line with the findings of the DC and DAB.

[64] Further, given that the applicant and KPMG are not FIs' or Islamic Financial Institutions as defined under s 131 of the FSA and s 143 of the IFSA, the secrecy provisions are not applicable to them. Section 131 of the FSA and s 143 of the IFSA state as follows:

> Section 131 of the FSA
>
> 'financial institution' refers to —
>
> (a) a licensed bank;
>
> (b) a licensed investment bank;
>
> (c) an approved operator of a payment system;
>
> (d) a registered operator of a payment system;
>
> (e) an operator of a designated payment system; or
>
> (f) an approved issuer of a designated payment instrument.
>
> Section 143 of the IFSA:
>
> 'Islamic financial institution' refers to —
>
> (a) a licensed Islamic bank;
>
> (b) a licensed international Islamic bank;
>
> (c) an approved operator of a payment system;

(d) an operator of a designated payment system; or

(e) an approved issuer of a designated Islamic payment

[65] Under rr 7(a) and 7(b) of the Disciplinary Rules the IC may call upon or employ any other 'person' to facilitate its investigation, if it deems it necessary to do so and where the present matter is concerned, the 'person' would be BNM, which the IC has called upon to process its application in relation to the disclosure of the requested information and BNM had given its 'green light' to the applicant to do so.

[66] In its letter dated 15 December 2016, BNM had stated that the applicant will be able to disclose the requested information pursuant to s 133(2)(a) of the FSA and s 145(2) of the IFSA. BNM, as a body corporate incorporated under s 3 of the Central Bank of Malaysia Act 1958 and currently governed by the Central Bank of Malaysia Act 2009 ('the CBMA'), meets the definition of 'person' as outlined under r 2 of the Disciplinary Rules. Rule 2 of the Disciplinary Rules states:

'person' includes any body of persons, corporate or unincorporated.

[67] MIA had requested BNM to assist in the lC's investigation of the other two complaints by way of letter dated 26 August 2016. Notwithstanding letters from BNM dated 24 October 2016 and 15 December 2016 and the MIA letter of 10 October 2016 requesting for the requested information, the applicant refused to provide. By the letters from BNM, there is in fact no prohibition in law for the applicant to disclose the requested information. The 'Investigation Committee's request' as referred to in the heading of the charge is a clear reference to the IC's letters to the applicant/KPMG requesting that they furnish the information to BNM, and that they further encompass BNM's letters as well, as per the clear and unequivocal wording of r 7(b) of the Disciplinary Rules.

[68] The applicant had therefore breached r 7(b) of the Disciplinary Rules. There is no error in the PC's and DAB's findings that the applicant had breached r 8 of the Disciplinary Rules due to his refusal to disclose the requested information to the IC or a body employed by it in conducting its investigation when so required by the said body. There is no indication that the DC or the DAB has found the applicant guilty of any alternative offence.

[69] Further, under s 140.7(c)(ii) of the by-laws, the applicant is bound by a professional duty or right to make a disclosure in response to an investigation by the IC or DC or any other regulatory body, provided such disclosure is not prohibited by law. Since there is no legal prohibition on making such a disclosure to BNM, there is no error of law in the IC's position that the

applicant had breached s 140.7(c) (ii) due to his failure to make the requested disclosure to BNM which is consistent with the charge framed against the applicant. The relevant elements of the charge have been made out against the applicant, as per the grounds of the DC and DAB's decisions.

[70] The case of *Foo San Kan & Ors v Institut Akauntan Malaysia & Anor* [2001] MLJU 393 cited by the applicant is distinguishable with the present matter. In that case, the applicants were found guilty for reasons materially different than what were set out in the charges against them. The 'offence' to which the applicant was found to have committed herein relates to his refusal to co-operate with the IC's investigation in disclosing the requested information to BNM, who was employed to assist the IC's investigation, which led to a significant delay in the investigation of the two other complaints against him. This 'offence' is fully encompassed by the particulars of the complaint and the sections listed under the charge itself which deal primarily with his failure to make a disclosure in co-operation with the IC's investigation. It is clear that the applicant has not been found guilty of a completely separate offence. This court finds that the requirements for the charge to be clear, specific and unambiguous have been met. Importantly, the respondent had responded to each and every aspect of the charge, and to each specific offence he is charged with under r 7(b) of the Disciplinary Rules and s 140.7(c)(ii) and s 150 of the by-laws which can be seen from his written submission to the DC and his representation to the DAB.

Ground 3

[71] It is submitted that the DC and DAB had misconstrued the relevant statutes and made errors of law in not finding that the applicant is prohibited from providing to the IC the requested information under ss 133(1) and 134(4) of the FSA and ss 145(1) and 146(4) of the IFSA. The errors are said to have led to a perverse decision that no reasonable person could ever have come to it.

[72] The disclosure of the requested information in this case is to BNM where it is explicitly permitted under s 132(2)(a) of the FSA and s 145(2)(a) of the IFSA. Such disclosure may be made to BNM in its capacity as a fellow regulatory body employed in assisting the IC's investigation. The disclosure is for the purpose of exercising BNM's functions and powers under the FSA/IFSA or CBMA.

[73] This court agrees with the respondents' submission that the applicant's attempt to equate the United Kingdom (UK) regulatory structure with the Malaysian regulatory structure, and to draw analogy from them, are irrelevant to the present matter. This court noted that even the applicant has admitted

that there are substantive differences in the UK regulations, including a significantly more extensive list of express exemptions from the prohibition on disclosure. After all the provisions of the Financial Services and Markets Act 2000 highlighted by the applicant are not in *pari materia* with the relevant provisions of the FSA/IFSA. Thus, they are immaterial to the matter at hand. In the present matter, it must be emphasised that s 133(1) of the FSA and s 145(1) of the IFSA are inapplicable to the disclosure of the requested information directly to the MIA but the MIA has employed BNM to ensure that the applicant has no objection to the disclosure of the requested information as disclosure to BNM is explicitly permitted under s 133(2)(a) of the FSA and s 145(2)(a) of the IFSA. Further, s 134(4) of the FSA and s 146(4) of the IFSA are inapplicable to the present matter as the applicant is not a FI or Islamic FI as defined under the FSA/IFSA.

[74] It is the applicant's contention that he had provided all the information not prohibited by law and as such he is not in breach of r 7(b) of the Disciplinary Rules or s 140.7(c)(ii) of the by-laws. This court agrees with the findings made by the DAB on this issue. The fact remains that the applicant has failed to furnish the un-redacted format documents/requested documents and failed to cooperate when BNM requested for the name of the FI and the account number. This court further agrees with the DAB when it rejected the applicant's argument that he had provided the requested documents to the IC after obtaining consent from 1MDB. The facts remain unchanged in that the applicant had failed to furnish the requested documents when he was requested to by the IC on numerous occasions even after clarification was obtained from BNM. The DC/DAB are justified to rely on the correspondences between the MIA, BNM and the applicant. At the risk of repetition, BNM is a regulator of the financial institutions, and BNM is empowered under ss 133(2)(a), 134(1)(b) of the FSA and ss 145(2)(a) and 146(1)(b) of the IFSA to permit/approve disclosure of any information and/or documents relating to the affairs or account of a customer, to any person.

[75] The applicant argued the DC and DAB also made error of law in finding that the requested information could be disclosed to the IC without the prior consent of 1MDB on the basis that the audit working papers files were the property of KPMG and that the requested information was contained therein. According to the applicant, the DAB's reliance on para 15.2 of the letter of engagement of KPMG by 1MDB is a mistake as they do not state that the applicant can provide information that he is prohibited by law from providing. Rhe applicant takes the position that even if the audit working paper was created by KPMG, it contains information that does not belong to KPMG and which is protected by law from disclosure.

[76] It is the finding of this court that the audit working papers and the information contained therein were the property of KPMG. This is clearly reFIected in paras 15.2 and 15.3 of the letter of engagement which read as follows:

> 15.2 *The working papers and files for this engagement created by us during the course of this audit, including electronic documents and files, are the sole property of our firm.*
>
> 15.3 In the event we are required pursuant to any subpoena or any other request or process to produce our working papers or any other documents or to assist in or provide explanations relating to this engagement in any judicial or any other proceedings, the Company shall reimburse us at standard billing rates for our professional time and expenses, including all legal costs, in responding to such subpoena, request or process. (Emphasis added.)

[77] It is of the considered view that the disclosure of any documents provided by 1MDB to KPMG for the purposes of the statutory audit is governed by the terms of engagement between 1MDB and KPMG. In para 6.1 of the general terms of engagement it is stated that:

> Information will not be disclosed by us to other parties except as required by law or professional standards and by-laws

[78] The consent from 1MDB for the disclosure of the requested documents/information is of no consequence. The applicant therefore cannot justify his refusal to furnish the IC with the un-redacted form of the audit working papers. The applicant's contention that he could not provide the un-redacted forms of the audit working papers to the IC as KPMG did not own the information contained therein, is therefore rightly rejected by the DC/DAB. There is no error of law and procedure in the findings of the DC/DAB on this issue.

Ground 4

[79] The applicant submits that the DAB (and DC) had wrongly relied on the MIA application and BNM correspondence with the applicant/KPMG and BNM is said to have no power to entertain, receive, consider, process or decide on the MIA application.

[80] Firstly, it is of the considered view that it is not for the MIA to go behind BNM's decision in respect of its power to entertain its application and if the applicant is unhappy with BNM's stance that it is empowered to receive and entertain the MIA's application, the applicant should have challenged BNM's decision in court. BNM has acted on the powers conferred to it under s 133(2)(a) of the FSA and ss 145(2)(a) of the IFSA, as well as s 134(1)(b) of the FSA, and s 146(1)(b) of the IFSA, which explicitly allow it to provide written approval for the release of FI information to any person. BNM cannot be said

to have acted ultra vires, as it is exercising powers conferred to it by the FSA/IFSA.

[81] The applicant has cited the case of *Wenlock (Baroness) v River Dee Co* (1885) 10 App Cas 354 to support his contention that the powers of a statutory body such as BNM are to be limited to those expressed in the statute and to be properly implied as incident to the purpose for which the corporation was created. In *Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd* [2015] 2 MLJ 509, the Court of Appeal had rendered the jurisprudence of doctrine of ultra vires enunciated in *Wenlock (Baroness)* to be a 'ghost of the past in corporate law jurisprudence'. The Court of Appeal had held as follows:

> Over the years the strict rule has been whittled down and the doctrine of ultra vires has also been modified in the company statutes in England, India as well as Malaysia (see s 20 of the Companies Act 1965). In fact, the strict jurisprudence relating to ultra vires doctrine as enunciated in *Baroness* case must now be seen as a ghost of the past in corporate law jurisprudence, and has limited application only to state created corporation, etc'.

[82] The applicant then referred to the case of *Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor* [2003] 6 MLJ 49, a case where BNM was held to have acted outside its powers when it approved an application under ss 45 and 46 of the Banking and Financial Institutions Act 1989 ('the BAFIA') as well as the grant or revocation of any approval for an exemption to the provisions of BAFIA under s 118 of the same Act.

[83] This court finds that *Aun Huat & Brothers Sdn Bhd* are materially different from the present matter. In that case, it is the Minister and not BNM who is explicitly mentioned/required in ss 45 and 46 of the BAFIA to approve the disposal of ownership shares in licenced institutions and that under s 118 of the BAFIA it is also the Minister's approval that is required to exempt an individual from any of the provisions of BAFIA. In the present matter, BNM is acting on the powers conferred to it under s 133(2)(a) of the FSA and s 145(2)(a) of the IFSA, as well as s 134(1)(b) of the FSA, and s 146(1)(b) of the IFSA, which explicitly allow BNM itself to provide written approval for the release of FI information to any person. As such, BNM is not acting ultra vires, as it is exercising powers conferred to it by the FSA/IFSA.

[84] The applicant further cited the cases of *Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd* [1985] 2 MLJ 359, *Bar Malaysia v Index Continent Sdn Bhd* [2016] 1 MLJ 445 and *Chase Manhattan Bank NA v Mercantile Co-operative Thrift & Loan Society Ltd* [1992] 2 MLJ 168 in support of his contention that a statutory body is not allowed to do anything unless authorised by statute and that there is no provision in the FSA, IFSA providing for the functions or powers of BNM to

request information or direct auditors as well as FIs to provide information to the MIA for its disciplinary proceedings under Act 94. However this court finds that the principles that can be garnered from these cases is in line with the respondents' position. As the FSA/IFSA explicitly allow BNM to provide written permission for the disclosure of FI information to any person, assessing requests or applications for such disclosure would further assist the purposes outlined in the FSA/IFSA as per the principles in the *Bar Malaysia* case specifically to 'foster fair, responsibie and professional business conduct' of FIs and FIs 'protect the rights and interests of consumers'.

[85] Secondly, the applicant is saying that there is no provision for the MIA's applications to be processed under the FSA/IFSA or CMBA. However, the applicant has not, at any time, alleged that the ability of BNM to process such applications would be in contravention to any of the stated objects or functions under any Act. The applicant's statement that s 134(1)(b) of the FSA and s 46(1)(b) of the IFSA only permit a financial institution to make such an application for disclosure is misconceived. It is the party who wishes to receive the information would be the ones to apply to BNM for such approval. If this court is to accept the applicant's contention, it would effectively mean that the external parties seeking disclosure would first have to apply to the FI instead, who would then decide if they should forward such an application to BNM; an interpretation that would effectively make the FIs the main arbiters on the issue of the disclosure of FI information. This would deprive BNM of its ability, as the regulator of FIs, to determine the disclosure and flow of FI information in line with its duties to protect the rights of the customers of FIs. BNM is clearly exercising its powers for the objects and purposes provided for under the FSA/IFSA and CBMA as the regulator of FIs in Malaysia in considering the MIA's application. It must not be forgotten that the obligation of the applicant to disclose the requested information stems from the request made to facilitate the IC's investigation. The applicant can be compelled to make such a disclosure to BNM as per r 7(b) of the Disciplinary Rules and the duty to make such disclosure if required under s 140.7(c)(ii) of the by-laws. It can be comprehended from the plain reading of the FSA/IFSA, BNM is fully empowered to process applications for the disclosure of FI information by bodies such as the MIA. BNM had given the direction for the disclosure of the requested information via its letters dated 24 October 2016 and 15 December 2016. There is no error of law when the DC and DAB relied upon the MIA's correspondence with BNM in regards to the disclosure.

[86] The entire facts of the matter show that the IC had made multiple requests for the disclosure of the requested documents/information from the applicant. The applicant had acknowledged via his letter dated 18 October 2016 that BNM had 'agreed to grant MIA approval' upon him furnishing the requested information to BNM. The applicant had stated that he would extend

his cooperation to the request made by MIA to BNM in the same letter. However, upon the approval by BNM for the disclosure, the applicant refused to cooperate. The change of mind of the applicant can be seen from his letter of 2 November 2016 when the applicant then gave reason that he now needs the permission from 1MDB before giving the requested document/information, a position taken which demonstrates lack of good faith and wilful refusal to assist the IC. It was well within the knowledge of the applicant that BNM required both the name of the FI and the relevant FI account details for the application because BNM had stated as such in the letters to him. However, the applicant simply refused to cooperate and cast aspersions on the truthfulness of BNM's statement by submitting that BNM could have easily written to the five FIs /Islamic FIs and asked them to release the requested documents/Information and that if BNM was serious about granting the approval, BNM could have done so.

[87] This court is satisfied that BNM is fully entitled to process the MIA's applications and BNM has not acted ultra vires any statutes in considering such applications.

Ground 5

[88] The applicant contends that the DAB and the DC erred in not taking into account that he had acted strictly in accordance with Appendix 1 of the by-laws. the applicant claims that he was compelled by Appendix 1 of the by-laws to enquire as to the statutory provision relied upon by BNM in requesting the requested information from him. It is the applicant's position that he is also required to request 1MDB's permission to disclose the requested information.

[89] Appendix 1 of the by-laws provides:

> If a professional accountant is requested to assist the police, the Inland Revenue Board or other authority by providing information about the business affairs of a client or employer in connection with enquiries being made, the professional accountant should first enquire under what statutory authority the information is requested. Unless the professional accountant is satisfied that such statutory authority exists, no information should be given until authorisation has been obtained from the client or employer. If such statutory authority is not forthcoming and the demand for information is pressed, the professional accountant should not accede unless so advised by his or her legal advisor. The position is the same whether the enquiries relate to a civil or criminal matter.

[90] It must not be forgotten that Appendix 1 is appended to s 140.7 of the by-laws. Section 140.7(c) of the by-laws is reproduced:

> (c) *There is a professional duty or right to disclose, when not prohibited by law:*

(i) To comply with the quality review of the Institute;

(ii) To respond to an inquiry or investigation by the Institute's Investigation Committee or Disciplinary Committee or any other regulatory body;

(iii) To protect the professional interests of a professional accountant in legal proceedings; or

(iv) To comply with technical and professional standards, including ethical requirements. (Emphasis added.)

[91] Having found that there is no legal prohibitions on the disclosure of the requested information to BNM, there is a professional duty or right to disclose on the part of the applicant. His refusal to be bound by this professional duty is a clear breach of s 140.7(c)(ii) of the by-laws.

[92] Section 140.7 of the by-laws states that Appendix 1 is 'additional guidance on confidentiality'. As such, Appendix 1 is just an additional guidance to be referred to in the event a specific scenario is not explicitly provided for in s.140.7 of the by-laws itself. In addition, Appendix 1 itself states that the outlined guidance in the appendix should be considered 'In addition to the requirements in Section 140'. Therefore s 140.7 of the by-laws merely outlines several requirements which must be complied with in the event of a request for such disclosure. This court finds that the request by MIA to BNM falls squarely within the ambit of s 140.7(c)(ii) of the by-laws. Appendix 1 for that matter is irrelevant to the facts of the matter herein.

Ground 6

[93] It is the applicant's contention that a breach of natural justice has occurred when he was not permitted to reply to or be heard in relation to BNM's letter dated 15 December 2016. This is indeed perplexing. The letter is addressed to the applicant and he had produced a reply to the letter on 10 January 2017. The applicant knew all along the charges against him was based on the very same letter and he had responded extensively to the charge. The applicant was not estopped to challenge the BNM's letter of 15 December 2016 at all levels. He was given the opportunity to address the issue at all stages of the DC and DAB proceedings and this court finds that the applicant's sufficient knowledge of the charge and his conduct in proffering his defence clearly shows that he was not prejudiced nor deprived of the opportunity to contradict the charge against him.

[94] It bears emphasised that the applicant was professionally represented at all material times and it is safe to presume that he had adequately put forward all the issues he raised in respect of the formal complaint. In *Francis v First Secretary of State and another* [2008] EWCA Civ 890, the court had stated:

> Had the appellant not been professionally represented at the hearing by a chartered town planner who was also a chartered architect, there would have been a stronger argument for a more interventionist role to have been played by the inspector at this informal hearing; but when an appellant is professionally represented, an inspector is normally entitled to expect that the appellant's case will be adequately put forward by that representative and will address at least those issues which have been identified beforehand by the pre-enquiry statements and such other documents as the planning authority's reasons for refusing permission.

[95] There is no reason for this court to interfere with the DC and DAB's decision on this ground.

Ground 7

[96] The applicant argued that the DAB and the DC had acted unreasonably and in error of law in failing to consider that the IC ought to have invoked r 7(c) of the Disciplinary Rules and made an application to the court for disclosure of the requested information.

[97] Rule 7(c) of the Disciplinary Rules is reproduced:

> 7 For the purposes of an investigation, the Investigation Committee may—
>
> (a) call upon or employ any person to conduct any preliminary inquiry it deems necessary;
>
> (b) require the member against whom the complaint was made or any other member who can help with the investigation to produce for inspection any books, documents or papers which may be reasonably required by the Investigation Committee or by the person so employed; and
>
> (c) apply to the High Court for an order to enforce paragraph (a) or (b).

[98] It is clear that in this case, the IC need not apply to the High Court for an order to enforce assistance with the investigation because BNM had confirmed that the requested information can be disclosed. It must be noted that the requirement under r 7(c) is not mandatory, the exercise of which is at the discretion of the IC. The Federal Court in *Pendaftar Pertubuhan v Datuk Justin Jinggut* [2013] 3 MLJ 16 had stated:

> Now, even if the discretion is an absolute one, the basic proposition is that *'the courts do not probe into the merits of a discretionary action or decision. The courts will not question a discretionary decision on such grounds as to whether it was correct or proper, right or wrong*. Also the courts will not substitute its own discretion for that of a concerned authority', (see the commentary by MP Jain in Administrative Law in Malaysia and Singapore (2nd Ed), p 340). (Emphasis added.)

[99] BNM, who are the regulators of FIs and Islamic FIs in Malaysia had agreed to the exceptions contained in the FSA and IFSA which permitted disclosure of the requested information to them. Given that BNM was empowered to process applications for the disclosure of FI information, there was no need for the IC to refer the matter to court for its determination. This court agrees with the respondents' submission that the application to BNM is clearly a route which is equally open to the IC under the law, and that the IC's discretion in choosing the BNM route is under the relevant provisions of the Disciplinary Rules and by-laws.

Ground 8

[100] The applicant contends that the applicant had acted reasonably and was justified in the precautions he took. The applicant is saying that he had acted bona fide.

[101] At the risk of repetition, the DC and DAB's decisions in finding the applicant guilty of 'unprofessional conduct' stem from the applicant's conduct in refusing to co-operate with the IC's investigation into complaints made against him since 2015. Despite being informed that there was no restriction against disclosure of the requested information to BNM, the applicant still failed and/or refused to comply with the requests of the IC and BNM, which led to the formal complaint filed against him on 5 January 2017. The applicant did not provide the requested information until July 2018, which was one year and seven months after BNM's letter informing him that there was no prohibition on the disclosure of the requested information. It is apparent that the applicant was aware at all material times that his failure to furnish such information to the IC would mean that he was in breach of r 7(b) as well as his duty under s 140.7(c)(ii) of the Disciplinary Rules. The fact that BNM has agreed that the disclosure can be done makes the reasons given by the applicant in refusing the same, untenable and can be seen as an attempt to delay in providing the requested documents/information since 2015 until 2018 which had the effect of delaying the investigation. The legal position had been made clear and any other reliance such as legal advice etc does not jive with the alleged bona fide act on the part of the applicant. In *Yong Toi Mee & Anor v Malpac Holdings Bhd & Ors* [2018] MLJU 326; [2018] 5 CLJ 619 (Tab 13, RBOA 2, pp 201–239), which states as follows:

> [73] Their *reliance on legal advice, even if true, is one striking example of why the conduct cannot be genuine or done in good faith, because what the legal position is has been made more than abundantly clear* by the Federal Court no less, such that an opinion on what the legal position ought to be on the applicability and implications of Section 132C is clearly secondary if not entirely irrelevant in the context.

[102] This court agrees with the respondents' submission that the DC and DAB's decisions and their correct findings of guilt are proportionate to the objectives of the creation of the MIA under Act 94 namely 'to regulate the practice of the profession of accountancy in Malaysia' under s 6(c) and to 'promote, in any manner it thinks fit, the interests of the profession of accountancy in Malaysia' under s 6(d). Given the decisions of the DC and DAB are important for furthering the above objectives under Act 94, it is clear that a finding of guilt to deter other members of the MIA from disobeying with their lawful obligations under the Disciplinary Rules and by-laws is entirely proportionate. It is of the considered view that the finding of the applicant's guilty of 'unprofessional conduct' is fair, proportionate, reasonable and lawful.

Ground 9

[103] The applicant continue to state that the DAB and DC made errors of law in not finding that where a statutory provision is capable of being interpreted in more than one way, the interpretation which favours the accused person facing penal sanctions (ie exculpatory interpretation), in this case the applicant, should be adopted.

[104] This court will not take the strict rules applicable to criminal trials or law to disciplinary proceedings. It is inapplicable herein. The cases cited by the applicant are criminal cases to which this court dismiss their applicability to the present matter. A disciplinary proceedings has different set of rules and in regards to the present matter and under rr 17 and 29 of the Disciplinary Rules, the DC and DAB are permitted to regulate their own procedures as deemed necessary. Rule 17 and r 29 of the Disciplinary Rules are reproduced:

> 17 Procedures of Disciplinary Committee
>
> Subject to the provisions of the Act and the Rules of the Institute, the Disciplinary Committee shall regulate its own procedures as it deems fit and necessary or desirable for the performance of its duties.
>
> 29 Procedures of Disciplinary Appeal Board
>
> Subject to the provisions of the Act and the Rule of the Institute, the Disciplinary Appeal Board shall regulate its own procedures as it thinks fit and necessary or desirable for the performance of its duties.

[105] No issue arises as to the competing interpretations of the FSA and IFSA as there are in existence the express provisions of s 133(2)(a) of the FSA and s 145(2)(a) of the IFSA, s 134(1)(b) of the FSA as well as s 146(1)(b) of the IFSA.

Ground 10

[106] The applicant says that the DAB and DC also erred in not finding that the motive for lodgement of the formal complaint was not bona fide as it was lodged under pressure from various unnamed persons, including media.

[107] It is of the considered view that the complainant's motive for lodging the formal complaint is irrelevant as there is no requirement in r 3 of the Disciplinary Rules that the lodging of the complaint must be made bona fide. This court agrees with the DC (and DAB) that the formal complaint lodge by the CEO was not based on hearsay since the CEO had the personal knowledge of the non-compliance by the applicant in providing the requested documents to the IC for the purpose of investigation.

Ground 11

[108] The applicant has contended that the IC's report attached to the notice of DC hearing is flawed, for the following reasons:

(a) it failed to take into account Appendix 1 of the by-laws;

(b) there is no legal basis for BNM to entertain MIA's application;

(c) the IC was incorrect to conclude that ss 133(1) of the FSA and 145(1) of the IFSA did not apply to the applicant. This is because BNM did not state that the applicant was not subject to s 133(1) of the FSA and s 145(1) of the IFSA, but instead that these sections did not apply in the event of disclosures in accordance with ss 133(2)(a) of the FSA and 145(2)(a) of the IFSA;

(d) that BNM did not make any ruling that the provisions of ss 133(1) of the FSA and 145(1) of the IFSA did not apply to the applicant, and has no power to do so; and

(e) that BNM's letter to KPMG dated 15 December 2016 stated that the purpose for requesting the requested information was that to 'enable the Bank to process the MIA's application'. There is no provision for BNM to do so under the FSA, IFSA and Central Bank of Malaysia Act 2009, and thus doing so would be ultra vires under these Acts.

[109] The ultimate effect of s 133(2)(a) of the FSA and 145(2)(a) of the IFSA is that the applicant is not legally prohibited from disclosing the requested information, which is the same finding made by the DC in the DC's decision. The IC's report has no impact on any substantive findings or decisions made by the DC and DAB, and the applicant has failed to prove otherwise. It is the finding of this court that there is clear authority for BNM to process the MIA applications under the FSA and IFSA, and the applicant's contention that

BNM is acting ultra vires is misconceived. Any purported flaws in the IC's report are all non-issues or matters which do not substantively impact the DC's and DAB's decision.

Ground 12

[110] The applicant contends that the DAB erred in law in failing to take into account that the MIA/IC considered irrelevant matters which tainted the entire disciplinary process. The alleged irrelevant matters in summary are as follows:

(a) the MIA's position on the Practice Review Committee is wholly irrelevant to the question of whether the requested information is prohibited by law from being disclosed;

(b) the fact that Deloitte did not refuse to disclose documents, invoking the FSA or IFSA is irrelevant to the question of the requested information is prohibited by law from being disclosed;

(c) the Investigating Officer did not know the role of the IC in the investigation process, and had not read the requested information before giving evidence; and

(d) the IC's role in the proceedings is inappropriate, and its role should be limited to assisting the DC and the proceedings when asked by the DC.

[111] This court finds that the applicant has failed to demonstrate how the alleged irrelevant matters had impacted the consideration of the DC or DAB or how consideration of these issues has shown that both the DC and DAB have misunderstood or being ignorant of the relevant fact. In fact none of these alleged irrelevant matters are shown to be the main consideration in the DC's and DAB's decisions. It must be remembered, the DC and DAB comprising of accountants are best equipped to decide which issues are relevant to a finding of 'unprofessional conduct' in relation to the actions of a fellow accountant. In addition, the DC and DAB have the discretion to implore acceptable procedure given the fact that they have the discretion over procedural matters. The Federal Court in *Lembaga Jurutera Malaysia v Leong Pui Kun* [2009] 2 MLJ 36 had stated:

> [36] The above legal propositions of the learned judge are flawed. They are in direct contrast with a long line of established Supreme Court, Federal Court and Court of Appeal authorities that hold that *every administrative body is the master of its own procedure and need not assume the trappings of a court.* The rules of natural justice do not contain any inalienable fundamental right to cross-examination of a witness, including the complainant (see Disciplinary Tribunals by JRS Forbes, 1990, at pp 115-121; *University of Ceylon v EFW Fernando* [1960] 1 WLR 235 (PC)). *The rules of natural justice are variable and do not mean adversarial procedures of a court of law or analogous to a court of law.* (Emphasis added.)

[112] The applicant's contention that the DC and DAB have considered irrelevant matters is not grounds for the quashing of the decision. The accounting profession as a self-reguiating profession ought to be allowed to define the ingredients to be considered when defining the 'professional or unprofessional conduct' of an individual within the profession.

Ground 13

[113] This court will not disturb the statutory right of the DC to award costs. Nowhere in the Rules which states the entitlement to a hearing on costs. Although the DC is not a party named herein, the costs imposed against the applicant is proper and reasonable and in accordance with r 18(3)(d) of the Disciplinary Rules.

CONCLUSION

[114] There is no manifest procedural irregularity that justify any judicial intervention herein. The court is always reminded that it must be cautious to interfere with the decision of professional bodies exercising disciplinary functions over members of their profession.

[115] This court will not invade into the merits and or reasons justifying the DC/DAB decisions as this is not an appeal process where the court can re-hear the merits of the case. As stated earlier, the procedures prescribed in the relevant Act, Rules and by-laws vis a vis the conduct of the disciplinary proceedings against the applicant had been complied with by the respondents at every stage. Although the court can to a certain extent (but with very much restrictions) inquired into the correctness of the decision by the administrative body, on the facts of the present application, this court is of the considered view that the requirements of the standards of 'illegality', 'procedural impropriety', 'irrationality' or 'proportionality' have not been satisfied by the applicant to incline this court to quash the decision of the DAB/DC.

[116] Premised on the above, the applicant's application was dismissed with costs.

Application dismissed with costs.

Reported by Ahmad Ismail